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91-1684

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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

BERESFORD WILLIAMS

SS. 127-46-9579

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER FOR WRIT OF CERTIORARI

Beresford Williams
Pro Se
250 Clarkson Ave. 319
Brooklyn, New York 11226
(718)693-6253

## QUESTION PRESENTED FOR REVIEW

Whether the District Court for the Eastern District of New York erred in dismissing the Petitioner s complaint on the ground that it was time barred?

## LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to Petitioner:

Beresford W. Williams, Pro-Se
250 Clarkson Ave 319
Brooklyn, New York 11226

United States Of America, Respondent
Attorney: Andrew J. Maloney,
United States Attorney for
the Eastern District of New York
1 Pierrpont Plaza
Brooklyn, New York 11201

Department of Justice, Tax Division
P.O. Box 502
Washington, D.C. 20044

Vivienne Pendley, SS 081-46-6153
266 New York Avenue
Brooklyn, New York11213

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CASE NO.

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October Term, 1992

BERESFORD WILLIAMS

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PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, BERESFORD WILLIAMS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit refusing to reverse the decision of the District Court for the Eastern District of New York.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported as BERESFORD WILLIAMS V. UNITED STATES OF AMERICA, (No. 1756-August Term, 1991) and appears as Appendix A to this Petition. The unpublished written opinion of the District Court for the Eastern District of New York appears in Appendix B to this Petition.

## JURISDICTION

The Court of Appeals opinion in this matter was filed on October 10, 1991. A timely Petition for Rehearing was filed on November 8, 1991

The Court of Appeals denial of the Petition for Rehearing was issued on Dec 16, 1991 and set forth in Appendix C.

## STATEMENT OF THE CASE

This is a suit arising under the laws of the Internal Revenue Code for a refund of $30,563 that was levied upon and received from the Property Clerk of the New York City Police Department. The levy was executed pursuant to a jeopardy assessment for the tax year 1982. In the filing Petitioner s complaint, it was alleged that the assessment and collection of the deficiency assessment for calendar year 1982 was erroneous and illegal. Subsequently a claim for refund was filed by the Petitioner with the District Director of Internal Revenue Service with respect to the tax year 1982. On November 21, 1988 the District Director issued a Notice of Disallowance stating that the Petitioner failed to show sufficient evidence that the money belonged to him.

On October 19,1990 the Respondent filed a

motion to dismiss the complaint on the ground that the action was time barred. The motion was granted in a memorandum decision entered on March 1, 1991 (Appendix B).

On March 7, 1991 the Petitioner filed an appeal with the Court of Appeals for the Second Circuit. On October 10, 1991, the Court of Appeals affirmed the memorandum decision of the District Court (Appendix A). The Petitioner then timely filed a Petition for rehearing which was denied on December 16, 1991.

## REASONS FOR GRANTING WRIT

Certiorari should be granted because the Respondent s motion to dismiss the complaint was improperly granted. The Respondent stated in its motion that the time period for the statute of limitations is nine (9) months from the time of the disallowance commenced with the Notice of Disallowance issued on November 21,1988. The action was commenced on September 12, 1989, ten (10) monthe after the Notice of Disallowance issued by the Internal Revenue Service.

It is noted that the Notice of Disallowance states that the law permits you to do this (file a suit or proceeding) within two (2) years from the maling of this letter. The Respondent is either wrong in its contention in the notice of motion or it lied and deceived an unwary taxpayer in its Notice of Disallowance. Since

the action was commenced well within the two (2) year period stated in its Notice of Disallowance, the order granting the motion to dismiss should be reversed.

The Respondent levied upon the in January, 1988. The Petitioner immediately filed a claim. This claim was denied by the IRS, and the Petitioner subsequently filed a claim for wrongful levy. This claim was only two (2) months after the denial and three (3) months after the levy. Hence, the Petitioner was not time barred administratively.

The Respondent cites in its brief IRS Sec. 6532 (c) (1) which states that no suit or proceeding under Section 7426 shall be begun after the expiration of 9 months from the date of levy or agreement (emphasis added) giving rise to such action. Clearly, the IRS did indeed agree to a two year statute of limitations when it issued its letter dated November 21, 1988. The

IRS is therefore estopped from claiming otherwise since Sec. 6532 (c) (1) permits the IRS to agree. Furthermore, contrary to the Respondent s position, the Petitioner was timely since his claim was indeed filed with the IRS only two (2) months after the denial of the claim and (3) months after the levy, well within the nine (9) month statute of limitations.

This Court should grant certiorari here to explicitly rule that the Petitioner was not time barred in the filing of his complaint.

## CONCLUSION

For the reasons stated herein, BERESFORD WILLIAMS, respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

BERESFORD WILLIAMS, pro se

Dated: March 11, 1992

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

CASE NO. _____

BERESFORD WILLIAMS,

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

PROOF OF SERVICE

I, BERESFORD WILLIAMS, do swear or declare that on this date, April 13, 1992, pursuant to Supreme court Rules 29.3, 29.4, 29,5, 33. 1 (d) and 38 (a), I have redone the Petition and served the attached on each party to the above proceeding, or on party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of

them and with first-class postage prepaid

The names and addresses of those served are as follows:

Andrew J. Maloney
United States Attorney
Eastern District of New York
1 Pierrpont Plaza
Brooklyn, New York 11201

Solicitor General
Department of Justice
Washington, D.C. 20530

Department of Justice
Tax Division
P.O. Box 502
Washington, D.C. 20044

LUCY CAMPOS
Commissioner of Deeds
City of New York - No. 2-6028
Certificate Filed In Kings County
Commission Expires July 1, 199_3

BERESFORD WILLIAMS

LUC
Commis
City of Ne
Certificate F
Commission

STATE OF NEW YORK
COUNTY OF KINGS

Subscribed and Sworn to Before Me

this 10th day of April, 1992

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1756--August Term, 1991

(Argued August 14, 1991

(Decided Oct 10, 1991

Docket No. 91-6065

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BERESFORD WILLIAMS,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,
Defendant-Appellee.

---

Before: MINER, WALKER and McLAUGHLIN,
Circuit Judges.

Appeal from judgment entered in United States District Court for the Eastern District of New York (Nickerson. J.) dismissing for lack of subject matter jurisdiction action for recovery of money collected by Internal Revenue Service pursuant to notice levy issued to possessor of money for purpose of satifying tax debt of third party. Affirmed.

BERESFORD WILLIAMS
Brooklyn, NY, pro se

Shirley D. Peterson, Assistant United States Attorney General, Washington, DC (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Brooklyn, NY, Gary R. Allen, David English Carmack, Curtis C. Pett, Tax Division, Department of Justice, Washington, DC, of counsel), for Defendant-Appellee.

MINER, Circuit Judge:

Plaintiff-Appellant, Beresford Williams, appeals from a judgment entered on March 1, 1991 in the United States District Court for the Eastern District of New York ( Nickerson, J.) dismissing an action commenced against defendant-appellee, the United States. In the suit , Williams sought to recover $30,563, plus interest and cost, which he alleged had been collected wrongfully by the Internal Revenue Service (IRS) pursuant to a notice of levy issued to the New York City Police Department (police department). The district court found that the action was untimely under 26 U.S.C.§ 6532(c) (1988). Williams contends that the district court applied the wrong statute of limitations and that, because he filed his complaint within ten months of the IRS,s denial of his request for the levied money, the action is timely. We reject this argument and affirm the judgment of the district court.

## BACKGROUND

In October 1982, Williams and one Dudley Pendley were arrested by New York City Police Officer. Incident to the arrest, the officer seized $30, 753 in cash, a large amount of marijuana and an automobile registered in the name of Pendley s wife, Vivian. Vivian Pendley filed a claim with the police department for the money and the car.

In January 1983, the IRS assessed a $26, 899 tax deficiency against Vivian Pendley for 1982, based on its determination that her reported taxable income for that year was insufficient to account for the automobile and the seized cash. The IRS also assessed additions to the tax deficiency for failure to pay, negligence and fraud, pursuant to 26 U.S.C. §§ 6651(a), 6653(a)(1), (2), 6654 & 6661. On July 22, 1983, the IRS issued to the police department a notice of levy on the cash. claiming the

money for the purpose of satisfying Vivian Pendley s tax deficiency. Shortly thereafter , Vivian Pendley withdrew her claim.

In March 1987, Williams filed a claim for the seized money with the police department. The police department denied the claim in December 1987, Informing Williams that the money has been forfeited. In Jan 1988, the police department turned the over the money to the IRS pursuant to the notice of levy, In April 1988, Williams filed a claim for the money with the IRS, alleging that the money represented proceeds from his candy store and belonged to him. On November 21, 1988, the IRS issued a Notice of Disallowance denying his claim. Apparently, the Notice of Disallowance form received by Williams included language indicating that he had two years in which to commence a court action to recover the money .

Williams filed this action in September 1989. The United States moves to dismiss on the ground that the action was time-barred under 26 U.S.C. § 6532(c), which governs actions for wrongful levy. In a Memorandum and Order dated February 19, 1991, the district court dismissed the complaint for lack of jurisdiction. Judge Nickerson found that Williams' action was time-barred under the nine- month statute of limitations of section 6532(c)(1) because it was filed more than six years after the notice of levy was issued. The district court further found that Williams was not eligible for the extension provided by section 6532(c)(2) because he filed his request with the IRS nearly five years after the levy. Williams timely appealed from the judgment.

DISCUSSION

When an action is brought against the United States government, compliance with the conditions under which the government has agreed to waive sovereign immunity is necessary for subject matter jurisdiction to exist. Long Island Radio Co. v. National Labor Relations Bd., 841 F.2d 474, 477 (2d Cir. 1988). Accordingly, the statute of limitations may operate in suit against the United States not as an affirmative defense, see Fed. R. Civ. P. 8(c), but also may deprive a court of subject matter jurisdiction over an action that is not timely filed. Dieckmann v. United States, 550 F.2d 622, 623 (10th Cir. 1977) (per curiam); Carlos v. New York State Dep't of Taxation, 531 F. Supp. 359, 362 n.6 (N.D. N.Y. 1981). Although several district Courts of this Circuit already have analyzed the issue of time limitations on suits against the United States for wrongful levy,

we consider the issue for the first time.

Williams argues that a two-year statute of limitations, running from the date of the IRS's denial of his claim for the money, applies to this action. This contention confuses an action for wrongful levy with an action challenging the denial of a tax refund, which carries a two-year statute of limitations, see 26 U.S.C. § 6532(a)(1). It is undisputed that the IRS did not levy upon the seized money to satisfy any tax debts owed by Williams, and his standing to bring this suit is not predicated on his status as a taxpayer. Yet, apparently, Williams' claim filed with the IRS in April 1988 was demoninated as a tax refund claim and the IRS issued on Nov 21, 1988 a Notice of Disallowance denying the refund request.

In any event, notwithstanding the advisement on the form received by Williams, the

two-year period set forth in section 6532 (a)(1) for a refund of taxes does not apply here. The sole remedy available to an individual such as Williams, who claim an interest in property that was levied upon by IRS for the purpose of satisfy the tax liability of another person, is a wrongful levy action asserted under 26 U.S.C. § 7426(a)(1). See Winebrenner v. United States, 924 F.2d 851, 854-55 (9th Cir.1991); Trust Co. of Columbus v. United States, 735 F.2d 447, 448 (11th Cir. 1984); United Sand & Gravel Contractors, Inc. v. United States, 624 F. 2d 733, 739 (5th Cir. 1980). Thus the timeliness of Williams' action must be determined by 26 U.S.C. § 6532(c). See 26 U.S.C. § 7426(h).

No suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy . . . . Id. § 6532(c)(1). Where the claimant makes an administrative claim for return of the

property, this time limitation is extended either by twelve months from the date of the claim or by six months from the date on which the IRS mails the Notice of Disallowance of the request, whichever extension is shorter. Id.§ 6532(c)(2).

Contrary to Williams' contention that the nine-month period began to run when he received a Notice of Disallowance in Nov 1988, service of the notice of levy on the possessor of the property triggers the running of the statute of limitations for purposes of section 6532(c). Winebrenner, 924 F.2d at 855 & n.5; State Bank of Fraser v. United States, 861 F.2d 954, 967 (6th Cir. 1988); Stuyvesant Ins. Co. v. Department of the Treasury, 378 F. Supp. 7, 10 (S.D.N.Y. 1974). Notice of the levy to all potential competing claimants to the property would be impractical and

overly burdensome on the government and, therefore, is not required. Dieckmann, 556 F.2d at 624; American Honda Motor Co. v. United States, 363 F. Supp. 988, 991-92 (S.D.N.Y. 1973). Here, the limitations period began to run on July 22, 1983, when the police department, as possessor of the seized money at that time, received the notice of levy. The present action was initiated more than six years later and clearly is time-barred.

The statutory extension of the time limitation is not implicated in this case. Although section 6532(c) does not require expressly that the administrative claim for return of the property be filed within the nine-month period in order to receive an extension, such a requirement is implicit: the nine-month period during which a suit must be filed could be extended by filing a request after the nine month period has

ended, the nine month rule would be without effect, and there would be no effective limitation period. United Sand and & Gravel, 624 F. 2d at 736; see also Barrett Treaty Ltd. v. United States, 624 F. Supp. 166, 168 (E.D.N.Y. 1985) American Honda , 363 F. Supp. at 991. Thus, the statutory extension is not applicable because Williams' administrative claim was submitted to the IRS more than nine months after the IRS levied upon the money. Furthermore, even if the administrative request in this case was timely filed, section 6532(c) would only extend the limitations period to April 1989, five months before the action was filed.

Finally, Williams argues that, by issuing to him a Notice of Disallowance which provided that a taxpayer has two years to file a civil suit challenging the disallowance of a refund, the IRS decieved an

unwary taxpayer." However, the mistaken advisment by the IRS does not require that Williams' action be allowed to proceed, since subject matter jurisdiction may not be created by estoppel or consent of the parties. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702 (1982); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17- 18 (1951); Long Island Radio, 841 F. 2d at 478.

## CONCLUSION

The judgment of the district court affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BERESFORD WILLIAMS,

Plaintiff

-against-

UNITED STATES OF AMERICA

Defendant.

89 CV 3073
MEMORANDUM
AND
ORDER

CHARLES L. EMMA
Brooklyn, New York
Attorney for Plaintiff

ANDREW J. MALONEY
United States Attorney
Eastern District of New York
(Rosanne Harvey, Keith V. Morgan,
of counsel)
Brooklyn, New York
Attorney for Defendant

NICKERSON, District Judge

This is an action to recover money the United States levied from the New York

City Police Department. The Plaintiff claims the money belongs to him. The government moves to dismiss on the ground that the action is barred by the statute of limitations.

In October 1982, a New York City Police Officer arrested plaintiff and a man named Dudley Pendley and seized a large quantity of marijuana, $30,753 in cash, and an automobile. Pendley's wife, Vivian Pendley, thereafter filed a claim for the money with the New York City Police Department ("Police Department").

In January 1983, the Internal Revenue Service ("IRS") assessed Ms. Pendley for $26,899 on the ground that she had not reported taxable income sufficient to account for the cash and the automobile, which was registered in her name. On July 22, 1983 the

IRS also served a levy on the Police Department asserting a right to the cash. Ms. Pendley subsequently withdrew her claim for the money in 1988, the Police Departm-ent made payment to the IRS pursuant to the levy.

In March 1987, plaintiff made a claim upon the Police Department for the cash but was informed in December 1987 that it had been forfeited. In April 1988,plaintiff filed a claim with the IRS, asserting that the se-ized cash belonged to him and was proceeds from his candy store. The IRS denied the claim in September 1988. In September 1989 , plaintiff brought this action.

26 U.S.C. §6532(c) provides that a wrong-ful levy action must be brought within nine months of the date of the levy unl-ess a request for return of the property is made to the IRS under 26 U.S.C. §6343 (b). Such a request extends the nine

month period for either twelve months from the date the request is filed or for six months from the date it is denied.

Plaintiff brought this action in September 1989, more than six years after the levy was served in July 1983. His request for return of the property was filed in April 1988, almost five years after the levy. While §6343(b) does not set a time limit for the filing of a request, statute has been interpreted to require the request to be made within nine months of the levy. See United Sand and Gravel Contractors v. United States, 624 F.2d 733, 736 (5th Cir. 1980).

Since plaintiff did not file either the administrative request or the complaint in timely fashion, the action is dismissed.

So ordered.

Dated: Brooklyn, New York
February 19, 1991

Eugene H. Nickerson, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of December , one thousand nine hundred and ninety one.

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BERESFORD WILLIAMS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

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DOCKET NO. 91-6065

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by pro se appellant, Beresford Williams.

Upon consideration by the panel that decided the appeal, it is

Ordered that the said petition for rehearing is Denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk